The trial Judge found that the estate was acquired in accordance with the family arrangement. He did not expressly so decide but it followed by necessary implication from the finding that Charles Wilkins held the land as a trustee for himself, his wife and his two sons in equal shares.

The trial Judge appears to have thought that the transfer to Kannammal was made during the Japanese war. In point of fact the transfer was made some eight months before the Japanese entered the war. While, therefore, it is possible that some precaution against the misfortune of war may have been in Wilkin's mind, the matter is open to doubt. The fact that he gave a letter to Kannammal at that time is consistent with the view that he wished to make some provision for her but there is no evidence of any specific intention to give her a share of this property, still less the whole of his own share, and if he ever formed such an intention it wholly failed for want of evidence.

It was argued that the original trust was unenforceable because no caveat was ever entered. This doctrine does not apply to a case such as the present one where the whole transaction was between members of the same family and household so that everyone concerned is necessarily taken to know the material facts. The Torrens law is a system of conveyancing; it does not abrogate the principles of equity; it alters the application of particular rules of equity but only so far as is necessary to achieve its own special objects. Wilkins was a trustee, as Kannammal knew. He alone could not alter the trust. He had no disposing power except over his own quarter share. The transfer to Kannammal therefore constituted her a trustee in his place. In the absence of any evidence that he exercised his disposing power she holds his share for his legal personal representative and the other three shares for the widow and sons and she must make registrable transfers accordingly as they direct. For these reasons the appeal was allowed with costs and the cross-appeal dismissed with costs.

Foster Sutton, C.J. : — I concur.

Wilson, J. : — I concur.

Appeal allowed.

THE PLANTERS' LOANS BOARD
v.
S. MANGALAM.

[Orig. Civ. Juris. (Wilson, J.) April 7, 1951]

[K. L. — Originating Summons No. 214 of 1950]

Planters' Loans Board — Whether debt owed to the Board is debt owed to the Government — Occupied territory — Powers of the occupying Government — Debtor and Creditor (Occupation Period) Ordinance — Interpretation and General Clauses Ordinance No. 7 of 1948, s. 35.

The plaintiff in this case called upon the defendant to show cause why a certain piece of land in the District of Kuala Lumpur should not be sold by public auction for the recovery of all principal moneys, charges expenses, fees, interest and costs due to the plaintiff in respect of two charges.

The defendant borrowed two sums of money amounting to $25,000 in 1940 and in 1941 on two charges on a piece of land. On August 17, 1945, the defendant paid $31,189.52 to the Custodian of Enemy Property and the land was discharged. The plaintiff claimed the loan and asked why the land should not be sold by public auction for the recovery of the loan.

There were three issues for the decision of the Court: (1) Whether the debts owed by the defendant were debts owed to the Government of the Federated Malay States (2) Whether the payment of $31,189.52 in occupation currency made by the defendant to the Japanese Custodian of the property of the plaintiff and apart from any statutory Enactment brought into force after the 31st March 1946, a good and valid payment of the whole of the debts owed by the defendant; and (3) Whether the said payment of $31,189.52 in occupation currency made by the defendant as aforesaid falls to be revalued under the provisions of the Debtor and Creditor (Occupation Period) Ordinance 1948.

Held, (1) that when a loan under the Planters' Loans Fund Enactment is granted, it is a loan by the Government to the individual to whom it is granted and the Board, in its control and management of the fund is a servant or agent of the Government (2) that the Japanese authorities during the period of the occupation had the power and the duty of administering the Government of the territory, not only in the interests of themselves but also of the inhabitants so far as is consistent with their own safety and (3) that the Government of the F.M.S. is bound by the provisions of any general enactment of law effective in the Federation unless expressly exempted.

Case referred to :—

(1) *Tamlin v. Hannaford* (1950) 1 K.B. 18.

ORIGINATING SUMMONS.

F. G. Charlesworth for the plaintiff.

W. G. W. Hastings for the defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Wilson, J. : — This is an Originating Summons under which the Planters' Loans Board require Madam S. Mangalam, the defendant, to show cause why a certain piece of land in the District of Kuala Lumpur

should not be sold by public auction for the recovery of all principal moneys, charges expenses, fees, interest and costs due to the Board in respect of two charges. Certain agreed facts and issues have been submitted.

The facts are that the defendant borrowed two sums of $22,000 and $3,000 respectively from the plaintiff and charged the land in question to secure repayment to the plaintiff of these sums by two charges dated the 8th day of August, 1940 and the 22nd day of January, 1941, respectively. Both these sums were repayable by half yearly instalments at specified times. None of these instalments was paid, in fact, nothing at all was repaid until the 17th day of August, 1945, when I find as a fact that a sum of $31,189.52 in repayment of the amount owed by the defendant to the plaintiff was paid voluntarily and without demand to a Custodian of Property in whom the property of the plaintiff had been vested by an Order or Decree of the Japanese occupying power. It has been agreed by Counsel for the plaintiff and the defendant that there are three issues for the decision of the Court. They are as follows :—

"1. Whether the debts owed by the defendant on the security of the said charges of the land held under Kuala Lumpur E.M.R. No. 2329 were debts owed to the Government of the Federated Malay States?

2. If the answer to 1 is in the affirmative, whether the payment of $31,189.52 in Japanese occupation currency made by the defendant to the Japanese Custodian of the property of the plaintiff on the 17th day of August, 1945 was, in law and apart from any statutory enactment brought into force after the 31st day of March, 1946, a good and valid payment of the whole of the debts owed by the defendant on the security of the said Charges of the land held under Kuala Lumpur E.M.R. No. 2329 executed by the defendant in favour of the plaintiff?

3. If the answer to 1 is in the affirmative, whether the said payment of $31,189.52 in Japanese occupation currency made by the defendant as aforesaid falls to be revalued under the provisions of the Debtor and Creditor (Occupation Period) Ordinance, 1948?"

The 1st issue. The Planters' Loans Board is a statutory Board created by the Planters' Loans Fund Enactment Cap. 131 of the laws. In the case of *Tamlin v. Hannaford*[1], Denning, L.J. who read the judgment of the Court of Appeal stated at page 25 :—

"The only fact in this case which can be said to make the British Transport Commission a servant or agent of the Crown is the control over it which is exercised by the Minister of Transport; but there is ample authority both in this Court and in the House of Lords for saying that such control as he exercises is insufficient for the purpose. [See **Cannon Brewery Co. Ltd. v. Central Control Board (Liquor Traffic)**]. When Parliament intends that a new corporation should act on behalf of the Crown, it as a rule says so expressly, as it did in the case of the Central Land Board by the Town and Country Planning Act, 1947, which was passed on the very same day as the Transport Act, 1947. In the absence of any such express provision, the proper inference, in the case, at any rate, of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department."

The Court held that the British Transport Commission is not a servant or agent of the Crown. Section 33 of the Town and Country Planning Act, 1947, states specifically that the functions under the Acts of the Board and or their officers concerned shall be exercised on behalf of the Crown. Those words are quite specific and so far as this issue is concerned it only remains to consider whether there is any provision of the Planters' Loans Fund Enactment which expressly provides that the Board should act on behalf of the government. The long title to the Enactment is as follows :-

"An Enactment to incorporate a Board to manage loans by the Government for agricultural and other purposes and to provide for certain terms of such loans."

The preamble to the Enactment states that the Government has set apart a sum of $4,000,000 of public money for the making of loans on the security of lands situated in the Federated Malay States.

Neither the long title nor the preamble is part of the Enactment, but both indicate that the legislature had in mind the making of loans by the Government and the establishment of a Board to manage those loans. Section 3 of the Enactment is as follows :—

"The control and management of the Fund shall, subject to the provisions of this Enactment, be vested on behalf of the Government in a Board consisting of not less than three persons or more than seven persons".

I have come to the conclusion that when a loan under this Enactment is granted, it is a loan by the Government to the individual to whom it is granted, and that the Board in its control and management of the fund is a servant or agent of the Government of the Federated Malay States.

The 2nd issue.

There would appear to be no direct authority on the point raised in this issue. The regulations regarding the laws and customs of war on land are to be found in the Annexe to the International Convention concerning the Laws and Customs of War on Land signed at the Hague on the 18th of October, 1907, and ratified by Great Britain on the 27th November,

1909, and by Japan on the 11th September, 1912, with a reservation in regard to Article 44 which is not material to this case. Article 48 of the regulations is as follows :—

"If, in the territory occupied, the occupant collects the taxes, dues, and tolls payable to the State, he shall do so, as far as is possible, in accordance with the legal basis and assessment in force at the time, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the national Government had been so bound."

Article 53 of the regulations provides that an army of occupation may take possession of cash, funds, and relizable securities which are strictly the property of the State. The question is whether the occupying power, that is to say, the Japanese were entitled to take control and management of the Planters' Loans Fund. This must depend on the rights and duties of an occupying power. As I have said there is no direct authority and one can only look for guidance from such authorities as the authors of Oppenheim's International Law and of the Legal Effects of War by McNair and of Chapter XIV of the Manual of Military Law on the Laws and Usages of War on Land issued by Command of the Army Council. At page 341 of Oppenheim Vol. II, revised 6th Edition, it is stated that as the occupant actually exercises authority and as the legitimate Government is prevented from exercising its authority the occupant acquires a temporary right to the administration over the territory and its inhabitants. At page 342 it is stated that the occupant has the duty of administering the country according to the existing laws and the existing rules of administration. Article 43 of the regulations referred to above lays down that the occupant shall do all in its power to restore and ensure as far as possible public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country. Section 353 of Chapter XIV of the Manual of Military Law states *inter alia* that during occupation of enemy territory the occupant should only exercise such power as is necessary for the purposes of the war, the maintenance of order and safety, and the proper administration of the country. It appears to me that Japanese authorities during the period of the occupation had the power and indeed the duty of administering the government of the territory not only in the interests of themselves but also of the inhabitants so far as consistent with their own safety. I have come to the conclusion that they were entitled to administer this fund which apparently they, in fact, did by vesting the property of the Board in a Custodian of Property and that the payment made to the Custodian on the 17th day of August, 1945, was in law apart from any statutory enactment brought into force later a good and valid payment for the whole of the debts owed by the defendant on the security of the charges on the land. It is true that it has been agreed between the parties that at mid-night on the 14th August, 1945, the Emperor of Japan commanded all armed forces of the Japanese Empire to cease active operation and that by a Proclamation dated the 15th August, 1945, Admiral Lord Louis Mountbatten, Supreme Allied Commander, South East Asia, proclaimed the establishment of a Military Administration throughout Malaya, but that the *de facto* establishment of such Military Administration did not take place until some date not earlier than the 29th August, 1945. It seems clear that on the 17th day of August, 1945, the Japanese occupation forces were still in occupation of Malaya, and administering the Government of it, and were still administering the Government on the 24th day of August, when the Custodian of Property executed a discharge of the charges of the land delivered the same to the defendant.

The 3rd issue.

As I have answered the first issue in the affirmative, it is necessary to consider the third issue. The point in short is whether the Government of the Federation of Malaya is bound by the provisions of the Debtor and Creditor (Occupation Period) Ordinance, 1948. Section 55 of the Interpretation and General Clauses Ordinance No. 7 of 1948 provides that no Ordinance or Enactment shall in any manner whatsoever affect the rights of the Crown unless it is therein expressly provided. The word "Crown" is not defined in the Ordinance. Quite clearly it would include the Imperial Government and it is usually conceded that similar sections in the legislation of Crown Colonies exempts the loal Government from the operation of the laws in like manner as the Imperial Government. The Federation of Malaya, however, is not a Crown Colony. The point apparently has never been decided in any Court in this country, but in my opinion the Government of the Federation of Malaya is bound by the provisions of any general Enactment of law effective in the Federation unless expressly exempted. I am strengthened in this view by the fact that in 1949 the legislature thought fit to amend the Control of Rent Ordinance, 1948, so as to exempt from the operations of the Ordinance premises which are the property of the Government of the Federation or the Government of any State or Settlement. Such an amendment would be unnecessary if it was clear that the Government of the Federation were not bound by the provisions of

the Ordinance. I answer the third issue in the affirmative.

Before making any formal Order on the Originating Summons which gives rise to these proceedings I wish to give counsel an opportunity of addressing me should they so wish on the form the Order should take having regard to my findings on the three issues.

Order accordingly.

ABDUL HAMEED MOHAMED IBRAHIM & CO.
v.
A. M. S. NAINAM SAHIB & COMPANY.

[Court of Appeal (Foster Sutton, C.J., Taylor and Russell JJ.) April 16, 1951]

[F.M. — Civil Appeal No. 53 of 1950]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 4(2)(b)(ii) — Demand for payment — Onus of proof.

The appellants in this case were the defendants in an action commenced by way of a specially endorsed writ claiming the balance of an account alleged to be due and owing to the plaintiffs by the defendants. The amount said to be owing was in respect of a "pre-occupation debt" within the meaning of section 2(1) of the Debtor and Creditor (Occupation Period) Ordinance, 1948.

The defendants denied liability, alleging that the debt had been paid during the occupation period pursuant to a demand for payment made for and on behalf of the Plaintiff-Respondent Company.

On behalf of the appellant it was argued that the trial Judge misdirected himself as to whom the onus of proof lay, that the burden of proof was upon the plaintiffs to prove that the money in question was paid without demand and that such burden had not been discharged.

Held, that where the plaintiff is seeking to obtain a revaluation under section 4(2)(b)(ii) of the Debtor and Creditor (Occupation Period) Ordinance, 1948, of a payment made to him by the defendant, the onus of proof that no demand was made is upon the plaintiff, but the burden of proof may shift to the defendant.

Cases referred to:—

(1) *Abrath v. North Eastern Railway Company* 11 Q.B.D. p. 440 at 456 — 457.

(2) *Arunasalam v. Ng Tai Nyong* (1950) M.L.J. 199; 1 M.L.R. 158.

COURT OF APPEAL.

F. G. Pooley for the appellants.

R. D. Hume for the respondents.

Cur. Adv. Vult.

Foster Sutton, C.J.: — The appellants in this case were the defendants in an action commenced by way of a specially endorsed writ claiming the balance of an account alleged to be due and owing to the plaintiffs by the defendants. The amount said to be owing was in respect of a "pre-occupation debt" within the meaning of section 2(1) of the Debtor and Creditor (Occupation Period) Ordinance, 1948.

The defendants denied liability, alleging that the debt had been paid during the occupation period pursuant to a demand for payment made for and on behalf of the Plaintiff-Respondent Company.

It was common ground that the payment was made in occupation currency on the 6th February, 1945.

On behalf of the appellants it was argued that the trial Judge misdirected himself as to where the onus of proof lay, that the burden of proof was upon the plaintiffs to prove that the money in question was paid without demand and that such burden had not been discharged.

Section 4(1) of the Ordinance provides, *inter alia*, that, subject to the provisions of sub-section (2) of the section, where a payment was made during the occupation period, in occupation currency, and such payment was in respect of a pre-occupation debt, "such payment shall be a valid discharge of such pre-occupation debt to the extent of the face value of such payment". Sub-section (2) of the section provides, *inter alia*, that, where such payment was made after the 31st December, 1943, and the amount was due but "was not demanded by the creditor or by his agent on his behalf", or if due and demanded was not paid within three months of the demand, such payment shall be revalued in accordance with the scale in the schedule to the Ordinance and shall be a valid discharge of the debt but only to the extent of the amount as revalued. It follows, therefore, that unless the case could be shown to come within the exception referred to, the amount paid by the defendants was a valid discharge of their debt to the plaintiffs.

The plaintiffs were seeking the protection provided by the exception, and the burden of proof that no demand was made clearly rested upon them. In a sense they were required to prove a negative, but if the assertion of a negative is an essential part of a plaintiff's case the proof of the assertion still rests upon him. As Bowen, L.J. said in *Abrath v. North Eastern Railway Company*[1]:—

"Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively."

At the conclusion of the evidence there was a conflict as to whether or not a demand for payment had been made within the three months immediately preceding the payment, and it was the duty of the trial Judge to determine whether, on the case as a whole,